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In The

# Supreme Court of the United States

October Term, 1998

El Paso Natural Gas Company, a Delaware Corporation; Cyprus Foote Mineral Company, a Pennsylvania Corporation and Cyprus Amex Minerals Company, a Delaware Corporation,

*Petitioners,*

vs.

Laura Neztsosie; Arline Neztsosie; and Zonnie Marie Dandy Richards, Individually and as Representatives of the Estate of Harold J. Richards, Sr.,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF OF *AMICUS CURIAE* AMERICAN NUCLEAR INSURERS ("ANI") SUPPORTING NEITHER PARTY AND SUGGESTING REVERSAL

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## STATEMENT OF INTEREST[1]

In the Price-Anderson Act, Congress originally limited liability from nuclear accidents to $560 million per accident funded in three layers. Today, that limit is over $9 billion. Congress directed that the first layer of financial protection should be handled by the private insurance industry. 42 U.S.C. § 2210(b)(1). American Nuclear Insurers ("ANI") is a voluntary, nonprofit pool of insurance companies who provide up to $200 million in private primary layer liability insurance to those licensees required to comply with Price-Anderson financial protection requirements. If claims exhaust this level of insurance, ANI also administers the secondary layer by collecting retrospective premiums (approximately $80 million per reactor) from nuclear reactor operators. *Id.* Today, the primary and secondary layers provide over $9 billion of total privately financed financial security for the nuclear risk. Originally there was a third layer of NRC indemnity up to a limit of $560,000,000 per accident when there were fewer reactors and less private primary insurance, but today the first two layers are completely sufficient to fully fund the total limit of liability. If claims exceed $9 billion, Congress will address the issue. Thus, ANI effectively administers the full Price-Anderson financial protection system from private insurance and retroactive premiums of over $9 billion.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ANI insures nuclear reactor facilities, suppliers and transporters. Less than half the policies ANI issues are to commercial nuclear power plants, most are issued to other businesses participating in the overall nuclear industry. ANI does not insure DOE facilities, contractors operating under a DOE contract, uranium mining or milling and conversion of uranium ore to uranium hexafloride. Primary layer coverage for these facilities is provided by DOE indemnity agreements and by conventional insurance. Most Price-Anderson cases which have been litigated have involved ANI's insureds. Since ANI is charged with effectively administering both the first and second level of claims payments for most participants in the nuclear industry, ANI is vitally interested in a body of law which effectuates the Congressional purpose to keep the nuclear industry insurable, and which serves to make the Price-Anderson system workable. The practical and experienced voice of ANI should be heard as how this Act should operate in order to keep this industry insurable as Congress desired.

One of the consequences of a high dose of radiation to a worker or to a member of the general public can be the development of a cancer years later. The American Cancer Society estimates that the natural incidence of cancer in the United States is about 50% for men and about 33% for women. AMERICAN CANCER SOCIETY, CANCER FACTS & FIGURES 1 (1997). It is likely that many people who worked in nuclear facilities or lived nearby will develop one of these natural incidence cancers at some time in their lives and will have concerns as to whether their cancer was caused by occupational or environmental radiation. Any radiation induced cancers resulting from the nuclear hazard will have to be identified from the



large natural incidence of cancer before compensation can be provided. If the law interpreting Price-Anderson were to result in compensation for any cancer, including those naturally occurring cancers, the nuclear industry would become uninsurable and the Congressional purpose would be defeated. In the 41 years that Price-Anderson has existed, the primary layer of private insurance has covered all claims against insureds of ANI. Consequently, the private insurance industry has been sufficient to insure the public interest in keeping the nuclear option open. ANI, as the administrative body through which those companies work, has fulfilled the public interest in providing that approximately 20 percent of U.S. electrical energy is provided by nuclear plants. Thus, the work of ANI was initiated at the direction of Congress, vested with the public interest, and is essential in effectuating the policies of the Atomic Energy Act of which Price-Anderson is a part. No other entity has developed such a comprehensive understanding of how the Act should work to accomplish its purposes.

## SUMMARY OF THE ARGUMENT

To effectuate nuclear safety, Congress has developed a comprehensive statutory system through the Atomic Energy Act, of which the Price-Anderson Act is a part. In 1988, Congress extinguished all prior existing state causes of action and replaced them with one cause of action, the public liability action ("PLA"). Given Congress' intent to protect all Americans from the harmful effects of specified radioactive materials and to provide an exclusive federal remedy if such harm occurred, it would be incongruous to carve out an exception to Price-Anderson

coverage merely because the exposure to radioactive materials occurred on an Indian reservation under tribal court jurisdiction. It would be fundamentally unfair to deny Indians the financial protection available under Price-Anderson. It cannot reasonably be argued that if a cloud of radioactive materials was released on the west coast and drifted across the United States, Congress intended for the Act's financial protection to disappear during the times that cloud passed over Indian reservations and to reappear again as soon as the cloud left Indian land. Thus, tribal courts should be treated the same as state courts under the terms of the Act.

## ARGUMENT

### I. Introduction.

The issues presented are whether the Price-Anderson Act ("PAA" or the "Act") applies to claims arising from radiation generated by uranium mining operations when there was no contract of indemnity with the Atomic Energy Commission ("AEC") (predecessor to the Nuclear Regulatory Commission ("NRC") or the Department of Energy ("DOE")) and, if so, whether such a PAA case should be litigated in tribal court.

### II. *El Paso Natural Gas* is a Price-Anderson Case.

#### A. The Applicability of Price-Anderson Depends on the Type of Radioactive Material Alleged to Have Caused Plaintiffs' Damages.

In the 1988 Price-Anderson Amendments Act (the "Amendments Act"), Congress extinguished all state law



causes of action and replaced them with a federal cause of action whenever a claimant alleges harm from certain radioactive materials specified in the Act. Congress broadly defined "public liability action" ("PLA") to mean "***any*** suit asserting public liability," 42 U.S.C. § 2014(hh), and defined "public liability" to mean" ***any legal liability*** arising out of or resulting from a nuclear incident . . . . " 42 U.S.C. § 2014(w) (emphasis added). Congress broadly defined "nuclear incident" to mean:

> ***any*** occurrence . . . ***within the United States*** causing . . . ***bodily injury,*** sickness, disease, or death, or ***loss of or damage to property,*** or loss of use of property, arising out of or resulting from the ***radioactive,*** toxic, explosive, or other hazardous properties of ***source, special nuclear, or byproduct material.***

42 U.S.C. § 2014(q) (emphasis added).

By defining public liability so broadly as to include "***any*** legal liability," Congress preempted and extinguished all state law causes of action for damages arising from those nuclear materials. *In re TMI Litig. Cases Consolidated II ("In re TMI")*, 940 F.2d 832, 854 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). The Third, Sixth, Seventh, and Eleventh Circuits have held:

> after the Amendments Act, ***no state cause of action based upon public liability exists.*** A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all.***

*Id.* (emphasis added); *Roberts v. Florida Power and Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998) ("The Amendments Act created an exclusive federal cause of action for radiation injury."), *petition for cert. filed*, 67 USLW 3285

(U.S. Oct. 16, 1998) (No. 98-640); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("state law claims cannot stand as separate causes of action. [Plaintiff] can sue under the Price-Anderson Act as amended or not at all."); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) ("a new federal cause of action supplants the prior state cause of action."); *see also* 141 Cong. Rec. S10,185-01, S10,185-86 (daily ed. July 18, 1995).

By defining nuclear incident so broadly, Congress intended to condition whether an action is a PLA on whether a plaintiff alleges bodily harm or property damage from ***"source, special nuclear, or byproduct material."*** "Source material" is:

> (1) ***uranium***, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ***ores containing one or more of the foregoing materials***, in such concentration as the Commission may by regulation determine from time to time.

42 U.S.C. § 2014(z) (emphasis added). "Byproduct material" is:

> (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) ***the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.***

42 U.S.C. § 2014(e) (emphasis added). Uranium mining and claims arising from such operations were specifically incorporated into Price-Anderson by Congress as "source



material." *Id.*; 42 U.S.C. § 2012(e). ("Source . . . material . . . are affected with the public interest. . . . "). Respondents allege bodily injury arising from source and byproduct material. Thus, Respondents' sole cause of action arising from exposure to source and byproduct material from Petitioners' mining operation must be litigated as a Price-Anderson case.

### B. A Nuclear Incident Is Not Limited to a Contract Location Included In an Indemnity Agreement.

#### 1. Congress Intended Price-Anderson to Cover More Than Just Defendants Who Had Entered an Indemnity Agreement.

Price-Anderson has developed over fifty years and must be viewed:

> in ***the context of the entire federal statutory scheme*** on nuclear power. The Amendments Act is simply the ***last addition*** to the federal law of nuclear energy ***that has been evolving*** since 1946 when Congress enacted the Atomic Energy Act. . . . Thus, the Amendments Act is the ***latest installment in nearly fifty years of congressional work***. During that time . . . Congress has balanced this encouragement of private sector activity with an acute concern for public safety by authorizing extensive regulation first by the Atomic Energy Commission, and now by the Nuclear Regulatory Commission, and by imposing a carefully constructed measure of liability should nuclear accidents occur.

*O'Conner*, 13 F.3d at 1095-97 (emphasis added). Congress' concerns for nuclear safety extend far beyond the site boundaries of an entity that has entered into an indemnity agreement.

In enacting the 1988 Amendments Act, Congress explained the broad coverage of the PAA:

> The financial protection arrangements, indemnities, and liability limitations cover ***any person who may be liable for damages from a nuclear accident,*** **not just the licensee or the contractor . . .**
>
> Currently there are 109 large commercial power plants and approximately 50 university research reactors, 7 Federal agency reactors, 16 non-power reactors, and 5 small power reactors licensed by the NRC and covered by Price-Anderson protection. In addition, there are over 100 DOE contracts containing Price-Anderson protection. ***They cover approximately 50 prime contractors and 70,000 subcontractors and lower-tier suppliers.***

H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 5 (1987) (emphasis added).

The Tenth Circuit recognized this broad coverage:

> From this framework, it is apparent that Congress intended to expand federal control over safety and liability issues involving the nuclear industry, particularly with respect to the role of federal courts in resolving liability. . . . [The Act's] provisions [are] broad enough to create a federal forum for ***any tort*** claim ***even remotely*** involving atomic energy production. The PAA ***on its face*** provides the sole remedy for the torts alleged . . . .

*Kerr-McGee Corp. v. Farley,* 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied,* 118 S. Ct. 880 (1998) (emphasis added). Likewise, the DOE Office of General Counsel officially interprets Price-Anderson as covering:



> all "persons indemnified" under the Act. The term "person" is ***broadly defined to include every possible individual or entity*** except the [NRC] or DOE . . . The term "person indemnified" is defined as the person with whom any indemnity agreement is executed," e.g., a DOE contractor, ***"and any other person*** who may be liable for public liability" for a nuclear incident. This provision extends the protection of the DOE Price-Anderson indemnification to ***any person, including those persons who have no legal relationship to DOE or the indemnified contractor,*** who may be liable for a nuclear incident within the United States arising under a DOE contract. Thus, a subcontractor, a supplier, a shipper or ***other third party*** is covered ***even if it is not a party to the indemnity agreement between DOE and the contractor.***

62 Fed. Reg. 68272, at 68274 (1997) (emphasis added). The DOE General Counsel further elaborated:

> The coverage was intentionally ***broad and extended to any person who may be liable for public liability.*** S. Rep. No. 1677, 87th Cong., 2d Sess. (1962), U.S. Code Cong. & Ad. News 2207, 2215-16. In the hearings on the original Act, "the question of protecting the public was raised where some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor and thereby cause damage to the public. Under this bill, the public is protected and the airplane company ***can also take advantage of the indemnification and other proceedings."***

*Id.* at n.18 (*quoting* S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803,

1818) (emphasis added). If the manufacturer of an airplane flying over a nuclear plant is covered without an indemnity agreement, then certainly the company that mined the uranium ore for the AEC is covered. Thus, El Paso comes within the definition of "person indemnified," even if it is not a party to an indemnity agreement.[2]

Given Congress' "sweeping" definition of a nuclear incident, and given the exclusive nature of the PLA cause of action, Price-Anderson does not require bodily injury or property damage to occur at any particular location. It only requires that the bodily injury or property damage arise out of exposure to those radioactive materials specifically defined in 42 U.S.C. §§ 2014(e), (z), and (aa).

Any other restrictive definition of a nuclear incident would make recovery under Price-Anderson limited to events occurring only at a facility directly covered by an indemnity agreement, and would leave unprotected members of the public who are injured by radioactive materials that have traveled through many vectors to reach them. This would be contrary to Congress' intent to protect all Americans from the nuclear hazard, wherever and however exposed.

### 2. *Gilberg's* Statutory Interpretation of the term "Occurrence" Is Erroneous.

The New Jersey District Magistrate's analysis of Price-Anderson in *Gilberg v. Stepan Co.*, 1998 WL 565978

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[2] Congress did not intend to enable a plaintiff to circumvent the entire Price-Anderson system by suing only a subcontractor or supplier who has not entered into an indemnity agreement.



(D.N.J. Aug. 20, 1998), contradicts the clear language of the Act. In *Gilberg*, the Court held that an indemnity agreement is a prerequisite for a PLA. *Id.* at *6. The magistrate misapplied the definition for the term "offsite" for purposes of an extraordinary nuclear occurrence ("ENO")[3] in subsection 2014(j) as being the definition for the term "occurrence" for purposes of a non-ENO nuclear incident in subsection 2014(q). *Id.* The *Gilberg* Court failed to discern that an ENO is a subtype of an ordinary nuclear incident. 42 U.S.C. § 2014(q). An ENO is "a discharge . . . ***offsite*** [which] . . . has resulted or will probably result in substantial damages to persons ***offsite*** or property ***offsite.***" 42 U.S.C. § 2014(j) (emphasis added). In order to determine whether any release traveled offsite there must be a clear distinction between "onsite" and "offsite" at any facility. The reference to a contract location was not intended to define the term "nuclear incident," but merely to explain how to determine the boundaries of the site for purposes of determining whether the release traveled offsite or remained onsite. Thus, Congress both provided the means to determine the site and indicated that the definition of "offsite" is

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[3] There are two criteria for the NRC to declare an ENO. 10 C.F.R. § 140.83. Criterion I requires a "substantial" offsite release of nuclear materials. This occurs, *inter-alia*, when the NRC "finds that one or more persons offsite were, could have been, or might be exposed to" a whole body dose of 20 rem (20,000 millirem). *Id.*, at § 140.84(a). Criterion II requires "substantial damages" to persons offsite. *Id.*, at § 140.85(a). In this context, "substantial damages" means, *inter-alia*, that the ENO "has resulted in the death or hospitalization, within 30 days of the event, of five or more people located offsite showing objective clinical evidence of physical injury from exposure to [nuclear material]." *Id.*, at § 140.85(a)(1).

limited to an ENO: "***As used in this subsection*** 'offsite' means away from the 'location' or the 'contract location'. . . . " *Id.* (emphasis added).

Congress defined, ***without qualification as to location***, the term "nuclear incident" as "***any*** occurrence . . . arising out of . . . source, special nuclear, or byproduct material. . . . " 42 U.S.C. § 2014(q) (emphasis added). Congress did not limit the definition of nuclear incident in the same way it limited the definition of "offsite" for the purposes of an ENO. A nuclear incident can occur anywhere and is not limited to a site covered by an indemnity agreement.

Recently, in commenting on a Final Rule revising the Department of Energy Acquisition Regulation ("DEAR") to implement the provisions of the Price-Anderson Act, the DOE directly refuted the *Gilberg* Magistrate's analysis:

> DOE agrees with the comments that an agreement between DOE and a contractor or its subcontractor or supplier ***is not a condition precedent to indemnification under Price-Anderson*** . . . One comment addressed the treatment of DOE clean-up contractors under the Price-Anderson indemnity framework. This comment urged DOE to (1) state explicitly that the Price-Anderson indemnity covered clean-up contractors, (2) extend Price-Anderson indemnity to all liabilities caused by mixed radioactive/hazardous wastes, and (3) coordinate nuclear and non-nuclear indemnification policies to avoid inadvertent gaps in coverage. Price-Anderson indemnity clearly is available to DOE "clean-up contractors." ***DOE finds no reason, however, to list the types of DOE contractors covered by the Price-Anderson indemnity since the coverage results not from the type of contractor but rather from the presence of a risk of public liability from a nuclear incident in the work to be performed under the contract.***



56 Fed. Reg. 57824, at 57825 (1991) (emphasis added). Thus, the *Gilberg* Court's analysis is wrong.

## III. The Price-Anderson Statutory System.

### A. Price-Anderson Background.

The federal regulation of nuclear power is one of the most comprehensive frameworks of federal regulation ever promulgated. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). States are precluded from regulating the safety aspects of nuclear energy. *See Silkwood v. Kerr-McGee*, 464 U.S. 238, 249 (1984) (federal government occupies entire field of nuclear safety); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 208 (1983) ("the safety of nuclear technology [is] the exclusive business of the Federal Government.").

Although nuclear power was originally a government monopoly, within ten years of passing the Atomic Energy Act ("AEA"), Congress concluded:

> that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing.

*Id.* at 207 (*citing* H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). Thus, the 1954 AEA ended the federal monopoly and encouraged private sector involvement

under federal licensing regulation. *In re TMI*, 940 F.2d at 852; *see* 42 U.S.C. §§ 2211-2281.

The federal government:

> ***erected a complex scheme*** to promote the civilian development of nuclear energy, while seeking ***to safeguard the public*** and the environment from the unpredictable risks of a new technology.

*Pacific Gas*, 461 U.S. at 194 (emphasis added). The 1954 AEA provided:

> for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission.

*Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 63 (1978); *Pacific Gas*, 461 U.S. at 207. The Atomic Energy Commission ("AEC") (the predecessor of the NRC) "was given ***exclusive jurisdiction*** to license the transfer, delivery, receipt, ***acquisition, possession, and use of nuclear materials.***" *Id.* (*citing* 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 ed. and Supp. V)) (emphasis added). "Upon these subjects ***no role was left for the States.***" *Id.* (emphasis added).

As a result of private industry's reluctance to participate in nuclear industry work because of the potential risk of "vast liability," *Duke Power Co.*, 438 U.S. at 64, Congress enacted the Price-Anderson Act of 1957, 42 U.S.C. § 2210, amending the AEA. It has the dual purpose of protecting the public by ensuring a reliable source of



funds for public compensation in the event of a nuclear accident, and encouraging the development of the nuclear energy industry by setting limits on the liability of private industry. *See* 42 U.S.C. § 2012; *In re TMI*, 940 F.2d at 852; *O'Conner*, 13 F.3d at 1096.

### B. The 1988 Amendments Act.

Building on preemption of the entire field of nuclear safety,[4] in 1988 Congress passed the Amendments Act which expressly delineated the scope of existing field preemption by creating a new and exclusive federal cause of action, the PLA. The Amendments Act dramatically transformed the Price-Anderson landscape in at least four ways.

First, the Amendments Act expressly created the PLA as the exclusive remedy for all injury or property damage claims arising from a "nuclear incident." 42 U.S.C. § 2014(hh); *In re TMI*, 940 F.2d at 837. Prior to the 1988 Amendments Act, there was no federal cause of action for a non-ENO, and there was no federal subject matter jurisdiction. *In re TMI*, 67 F.3d 1103, 1105 (3d Cir. 1995),

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[4] The "purpose of Congress is the ultimate touchstone" in preemption. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). The scope of preemption must rest primarily " 'on a fair understanding of congressional purpose' " which may be discerned from both the language of the statute and "the way in which Congress intended the statute ***and its surrounding regulatory scheme*** to affect business, consumers, and the law." *Id.* at 486 (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992)) (emphasis added).

*cert. denied*, 516 U.S. 1154 (1996). Accordingly, prior to the Amendments Act, persons claiming injury from radiation, such as the Respondents here, could file state law causes of action in state or federal courts, and could recover under any theory of liability available in the applicable state court. *Id.*; *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 216-217 (D. Me. 1996). After the Amendments Act however:

> ***no state cause of action based upon public liability exists.*** A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all.***

*In re TMI*, 940 F.2d at 854 (emphasis added). *See also Roberts*, 146 F.3d at 1308; *Nieman*, 108 F.3d at 1553; *O'Connor*, 13 F.3d at 1099-1100; 141 Cong. Rec. S10,185-01, S10,185-86 (daily ed. July 18, 1995).

Second, the Amendments Act guaranteed the defendant a federal forum by providing the United States district courts with original jurisdiction, and by providing for the removal of PLAs to the district court at the defendant's election. 42 U.S.C. § 2210(n)(2).[5] Thus, while state courts retain jurisdiction over the PLA, any defendant has the right to remove to a federal district court pursuant to § 2210(n)(2).

Third, Congress also mandated that the rules for decision in a PLA will be consistent with the NRC, DOE,

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[5] Section 42 U.S.C. § 2210(n)(2) states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the incident takes place . . . shall have original jurisdiction.



or AEC regulations through which the federal preemption of nuclear safety is effectuated, by preempting all state law rules for decision that are ***"inconsistent"*** with the Price-Anderson Act.[6] 42 U.S.C. § 2014(hh) (emphasis

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[6] The exact language, "such section," in § 2014(hh) (referring back to § 2210) is an artifact from the 1988 Amendments Act, which was primarily contained in § 2210. 42 U.S.C. § 2014(hh) (A PLA "shall be deemed to be an action arising under section 2210. . . . "); *O'Conner*, 13 F.3d at 1100. Both the legislative history and well established subsequent case law interpret the phrase "such section" as referring to the entire Price Anderson Act. *See e.g., id.* and *In re TMI*, 940 F.2d at 856 (both citing H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 ("unless such law is inconsistent with the Price-Anderson Act.")); *In re TMI*, 67 F.3d 1119, 1123 (3d Cir. 1995) (interpreting "such section" as the "Price-Anderson Act"); *Nieman*, 108 F.3d at 1552 (considering whether plaintiff's claim was inconsistent with "the Price-Anderson Act" in section of opinion entitled "Consistency with Price-Anderson Act."); *O'Conner*, 13 F.3d at 1101 ("courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme."). Also, § 2210 itself explicitly and implicitly incorporates and defers to the existing federal regulatory framework. For example, § 2210(a) requires each licensee to carry "financial protection of such type and amounts as the [NRC] . . . in the exercise of its licensing and regulatory authority and responsibility shall require . . . " Thus, in § 2210(a), Congress expressly deferred to the ***NRC's regulatory control over nuclear plants.*** *See also*, S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803, 1819 (leaving the ***control*** over misconduct to the ***NRC licensing process***); 133 Cong. Rec. H6,815 (daily ed. July 30, 1987) (statement of Mr. Udall reading letter of Secretary of Energy) (excluding penalties from the Act since ***federal regulations will control conduct***). Section 2210(a) requires as a condition of a license, each licensee to have and maintain financial protection "for the public purposes cited in § 2012(i)." In § 2012(i), Congress declared its policy to "protect the health

added); *In re TMI*, 67 F.3d 1119, 1122 (3rd Cir. 1995); *In re TMI*, 940 F.2d at 857; *O'Conner*, 13 F.3d at 1101. After creating the exclusive PLA, Congress did not go on to provide a "complete and self-sufficient body of federal law" to be applied in a PLA, but Congress rarely does so. *In re TMI*, 940 F.2d at 854. The "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *Nieman*, 108 F.3d at 1552 (*quoting O'Conner*, 13 F.3d at 1100). In amending the Act,[7] Congress was well aware that the Price-Anderson compensation system must operate as a consistent part of a larger federal framework governing the safe use of nuclear energy. *O'Conner*, 13 F.3d at 1100 ("Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law."); *id.* at 1105 (Price-Anderson operates within "a stringent regulatory background.").

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and safety of the public and to encourage the development of the atomic energy industry, in the interest of the general welfare. . . . " This policy is accomplished through the NRC permissible dose limits which provide a licensee with "a clear statement regarding how it may limit a worker's dose ***without exposing the worker to injury or itself to liability.***" *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) (emphasis added). *See also O'Conner*, 13 F.3d at 1103; *In re TMI*, 67 F.3d at 1115. That Congress included and deferred to the work of the NRC in its reference to § 2210 is demonstrated by the fifty-seven times the words "Nuclear Regulatory Commission" or "Commission" are actually used in § 2210.

[7] Approximately every ten years since enacting Price-Anderson Act, Congress has amended it in light of current experience, continually building and refining a comprehensive federal structure to protect both the nuclear industry and the public. *In re TMI*, 940 F.2d at 852-53.



The "federal nuclear safety regulations," including the permissible dose limits established by 10 C.F.R. § 20.101, "are a part of this" larger federal framework. *Id.* Congress is presumed to know "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Congress was not required to repeat in the Amendments Act every regulation or judicial determination that it knew had already been enacted or decided. It knew that "[n]umerous federal questions will necessarily arise in the course of litigation under this Act, which questions must be resolved consistently with the pervasive federal scheme." *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448, 454 (C.D. Ill. 1991), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).

By directing federal courts to "derive" (not adopt) federal rules for decision only from state law rules for decision that are consistent with existing federal regulatory and statutory law, Congress delineated the scope of field preemption, and set the entire preexisting federal framework ***it had already erected*** as the polestar by which the federal judiciary should be guided as it establishes this new body of federal law interpreting the PLA. *In re TMI*, 940 F.2d at 854; *O'Conner*, 13 F.3d at 1105; *Nieman*, 108 F.3d at 1552; *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994). In *O'Conner*, the Seventh Circuit confirmed that the existing federal framework was the standard by which the consistency of state rules for decision must be measured: "[W]e must look at the Amendments Act ***in the context of the entire federal statutory scheme*** on nuclear power." *O'Conner*, 13 F.3d at 1095-97 (emphasis added).

Through these important changes, the Amendments Act established an efficient, nationally uniform system in which valid claims are quickly compensated and invalid claims are denied. *See generally, id.* at 1100-1101, 1105.

### C. With the 1988 Amendments Act Congress Limited *Silkwood*.

This Court's *Silkwood* opinion interpreted Price-Anderson ***as it existed four years prior to the changes made in 1988 Amendments Act.*** This Court held:

> No doubt there is ***tension*** between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But . . . ***Congress intended to stand by both concepts and to tolerate whatever tension there was between them.*** We can do no less.

*Silkwood*, 464 U.S. at 256 (emphasis added). Concurring with the dissents, Congress dramatically transformed the Price-Anderson landscape and resolved that "tension." *See O'Conner*, 13 F.3d at 1105 n.13. ***Congress created the precise federal remedy for persons injured by radiation that the Silkwood majority had found missing.*** The 1988 Amendments Act severely limited the precedential value of *Silkwood*.[8] *See In re TMI*, 940 F.2d at 857-58; *In re TMI*,

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[8] *Silkwood* is further distinguishable from a PLA case on the following grounds: First, *Silkwood* did not address any issues in a PLA. Second, *Silkwood* discusses remedies not causes of action. Third, *Silkwood* was a diversity action, 464 U.S. at 243, not a Price-Anderson case. *Id.* at 251. Fourth, the federal regulations governing offsite exposure to plutonium were exceeded. *See*



67 F.3d at 1124 (Congress partially limited *Silkwood's* holding in 1988).

### D. Tribal Courts Should be Treated Like State Courts.

The PAA does not mention tribal courts in its text or in its legislative history. The NRC has recommended that Congress address this issue when it next amends Price-Anderson: "The commission recommends that Congress should determine whether a public liability lawsuit arising or resulting from a nuclear incident may be filed in a tribal court." United States Nuclear Regulatory Commission, *The Price-Anderson Act – Crossing the Bridge to the Next Century: A Report to Congress*, at 131 (August 1998). Until that time, ANI sees no reason to treat tribal courts as anything less than state courts under the current Act. Congress intended for all persons in the United States to enjoy the financial protection created by this Act. It cannot be reasonably argued that if a cloud of radioactive particles was released on the west coast and drifted across the United States to the east coast, Congress intended for the Act's financial protection to disappear

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*Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 583 (W.D. Okla. 1979) (Silkwood's exposure to plutonium in her apartment exceeded by two and a half times the exposure permitted), *aff'd in part and rev'd in part on other grounds*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238 (1984). Fifth, *Silkwood's* dictum that ***compensatory damages*** do not conflict with the federal preemption of nuclear safety is a reference to the measure of compensatory damages for the injury suffered by the plaintiff. Compensatory damages say nothing about a defendant's conduct and are therefore irrelevant to the standard of care. Finally, the *dicta* in footnote 12 fails to realize that "other persons indemnified" includes "any other person who may be liable as defined in" 42 U.S.C. § 2014(t).

during the times that cloud passed over Indian reservations and to reappear again as soon as the cloud left Indian land. Thus, tribal courts should have jurisdiction over a PLA and the defendant can elect to remove such a case to federal court pursuant to 42 U.S.C. § 2210(n)(2).

## IV. Application of the Price-Anderson Statutory System to This Case.

### A. All Tribal Law Causes of Action Are Extinguished.

The Price-Anderson Act does not expressly divest tribal courts of jurisdiction. However, like all prior state law causes of action, all tribal causes of action have been extinguished. Justice Kleinfeld was correct in stating that there are no longer any tribal remedies to exhaust. *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 621 (9th Cir. 1998) (Kleinfeld, J., dissenting) ("There can be no claim for which exhaustion in tribal court can be required."), *cert. granted*, 67 USLW 3024 (U.S. Oct. 13, 1998) (No. 98-6).

### B. The Tribal Court Has Jurisdiction Over a PLA and Must Apply Rules of Decision that are Consistent with the Federal Preemption of Nuclear Safety.

When Congress enacted the Amendments Act, it required all courts adjudicating a PLA to apply only those rules of decision which were consistent with the overall federal preemption of nuclear safety. 42 U.S.C. § 2014(hh). A tribal court must do the same. When Congress created the PLA, it specifically labeled that action in the singular, and clearly established only one cause of action: "***A*** public liability ***action*** shall be deemed to be ***an***



***action*** arising under . . . and the substantive rules for decision in ***such action***. . . ." *Id.* (emphasis added). Thus, the statutory language allows for only one cause of action: the PLA. Further, state or tribal law causes of action are not "rules for decision" in a PLA cause of action – they are totally ***different causes of action*** which have been extinguished and supplanted by the PLA.

Since the PLA is the ***sole*** cause of action authorized by Congress, there cannot also be a ***different*** cause of action by which a plaintiff can obtain recovery. *See In re TMI*, 940 F.2d at 854 ("the consequence of a determination that a particular plaintiff has failed to state a public liability claim . . . is that he has no such claim at all."); *O'Conner*, 13 F.3d at 1100. Accordingly, no tribal law causes of action can be used to obtain recovery from an alleged injury covered by Price-Anderson.

### C. The Standard of Care Must be the Applicable Federal Dose Limits or the NCRP and ICRP Recommendations from Which They Were Taken.

Section 2014(hh) preempts state law standards of care that conflict with the federal (NRC, DOE or AEC) safety standards establishing permissible dose limits for workers or the general public. *See In re TMI*, 67 F.3d at 1106 ("we found federal preemption of state tort law on the applicable standard of care"); *In re TMI*, 940 F.2d at 858 ("Two Supreme Court cases [*Pacific Gas* and *Silkwood*] indicate that the duty the defendants owe the plaintiffs in tort is dictated by federal law."); *O'Conner*, 13 F.3d at 1105. Only federal nuclear safety standards can provide the standard of care in a PLA. "Imposing a standard of care other than the federal regulations would disturb the

carefully crafted balance between private involvement and safety that Congress has achieved." *Id.*

To sustain a PLA a plaintiff must establish a dose that exceeds the applicable federal dose limits and causation. Such requirements achieve coherence and consistency between the AEA, the Price-Anderson Act and the federal regulations governing permissible doses. *See O'Conner*, 748 F. Supp. at 678. ("There are two aspects of the federal regulatory scheme governing the operation of nuclear powerplants which are relevant to the issues here. One is the federal regulatory framework governing the permissible dose limits allowed at nuclear power plants. The other is the regulatory framework governing actions for claims arising out of the doses received at the plant.").

Eleven appellate and district courts have held that the federal dose limits "constitute the applicable standard of care."[9] As the Eleventh Circuit explained:

> Virtually every federal court to consider the issue, including three circuit courts of appeals, have held that "federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action." . . . This is because "any state duty would infringe upon pervasive federal regulations in the field of

[9] *Roberts*, 146 F.3d at 1308; *In re TMI*, 67 F.3d 1103; *O'Conner*, 13 F.3d 1090; *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457 (S.D. Cal. 1996); *Smith v. General Elec. Co.*, 938 F. Supp. 70 (D. Mass. 1996); *Bohrmann*, 926 F. Supp. 211; *Corcoran v. New York Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12 (D. Mass. 1995); *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495 (N.D. Ill. 1991); *O'Connor*, 748 F. Supp. at 678.



> nuclear safety, and thus would conflict with the federal law." . . . Moreover, the federal statutory scheme limits the liability of operators of nuclear power facilities and provides for indemnification but does so against a stringent regulatory background. Therefore, as the Seventh Circuit Court of Appeals noted, "[i]mposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved." [citation omitted] Consequently, we join those courts in holding the federal safety regulations conclusively establish the duty of care owed in a public liability action.

*Roberts*, 146 F.3d at 1308 (citations omitted).

The federal permissible dose limits must necessarily provide the duty owed in a PLA because the federal preemption of nuclear safety has been expressed in the permissible dose limits. *Silkwood*, 464 U.S. at 240-41 (federal government occupies entire field of nuclear safety "states are precluded from regulating the safety aspects of nuclear energy."); *Pacific Gas*, 461 U.S. at 212 ("the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation . . . [and] has occupied the entire field of nuclear safety concerns."); *O'Conner*, 13 F.3d at 1105; *In re TMI*, 67 F.3d 1106-07 ("*TMI II* decided this issue by preempting state tort law on the standard of care."); *In re TMI*, 940 F.2d at 858. Any other standard would be inconsistent with the objectives of federal law:

> [W]e believe that the federal regulations must provide the ***sole measure of the defendants' duty*** in a public liability cause of action. . . . Imposing a standard of care other than the federal regulations would disturb the carefully crafted balance

> between private involvement and safety that Congress has achieved. ***Thus, the application of something other than the federal safety regulations as a standard of care is inconsistent with the Price-Anderson scheme and consequently cannot be applied in a public liability action.***

*O'Conner*, 13 F.3d at 1105 (some internal citations omitted) (emphasis added).[10] As the Third Circuit Court explained:

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[10] ALARA (As Low As Reasonably Achievable) is a federally endorsed professional philosophy of excellence, not a permissible dose limit standard of care:

> ***Adoption of a standard as vague as ALARA would give no real guidance to operators and would allow juries to fix the standard case by case and plant by plant.*** An operator acting in the utmost good faith and diligence could still find itself liable for failing to meet such an elusive and undeterminable standard. Our holding protects the public and provides owners and operators of nuclear power plants with a definitive standard by which their conduct will be measured.

*In re TMI*, 67 F.3d at 1115 (emphasis added) (citations omitted). Allowing a jury to determine what is "reasonably achievable," would destroy the uniformity Congress sought to achieve in creating a single cause of action based on one standard of care and would turn federally preempted nuclear safety over to the opinion of a lay jury. *See id.* ("Adopting ALARA as part of the standard of care would put juries in charge of deciding the permissible levels of radiation exposure . . . issues that have explicitly been reserved to . . . NRC."). Six courts have expressly rejected ALARA as a standard of care. *See id.* at 1103; *McLandrich*, 942 F. Supp. at 467; *Smith*, 938 F. Supp. at 72 nn.3, 4; *Bohrmann*, 926 F. Supp. at 219-20; *Corcoran*, 935 F. Supp. at 386; *Akins v. Sacramento Mun. Util. Dist.*, 8 Cal. Rptr. 2d 785 (1992), *rev. dismissed*, 868 P.2d 905 (1994).



> The result is the same regardless of whether the state adopts stricter or more lenient safety standards. If stricter safety standards are imposed, the state will create a disincentive to nuclear power that is in conflict with federal law. If more lenient standards are imposed, the state will undercut federal safety efforts.

*In re TMI*, 940 F.2d at 860 n.22. Virtually every federal court to consider the issue has agreed with *O'Conner* and *In re TMI*.

> The permissible dose limits:
>
> are based upon the national and international scientific consensus as to the hypothetical risk from exposure to low . . . levels of . . . radiation . . . [and are] not expected to cause appreciable bodily injury. . . .

*O'Conner*, 748 F. Supp. at 677 (*quoting Johnston v. United States*, 597 F. Supp. 374, 424 (D. Kan. 1984)). "Appreciable bodily injury" means:

> any bodily injury or effect that the average person would regard as being objectionable and/or competent medical authorities would regard as being deleterious to the health and well being of the individual.

*Johnston*, 597 F. Supp. at 424-25. The historical development of the dose limits demonstrates the intense efforts that were invested by the federal government in effectuating the Act's dual purpose of developing the nuclear industry while safeguarding the public and workers who would benefit from and work in the industry. *See generally id.* at 390-92; *In re TMI*, 67 F.3d at 1110-1112. Congress has delegated to the NRC and DOE (and before them the AEC) decisions affecting public safety. These federal agencies have already achieved a balance between the

risks and the benefits presented by nuclear energy. *O'Conner*, 748 F. Supp. at 677-78. In *Silkwood*, this Court reasoned that Congress' decision to prohibit the states from regulating the safety standards of nuclear energy was:

> premised on its belief that the [NRC] was more qualified to determine what type of safety standards should be enacted in this complex area . . . Congress . . . provided for continued federal control over [radiation] because the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them.

*Silkwood*, 464 U.S. at 250. *See also Corcoran*, 935 F. Supp. at 389 ("It would be inconsistent with the Act to allow the plaintiffs to state a claim of any kind that is premised on an exposure to radiation which a federal agency, in its expertise, has concluded is not unsafe."). This is a classic example of the federal government making a policy decision, after appropriate consultation with experts in the field. If there are no applicable NRC or DOE regulations (or AEC regulations) to establish the duty owed by defendants in this case, the adjudicating court should adopt the national and international scientific consensus as presented in publications of the National Council of Radiation Protection and Measurements (NCRP) and International Commission of Radiological Protection (ICRP), upon which those NRC, DOE and AEC safety regulations are based. *Johnston*, 597 F. Supp. at 390-92. *See also, O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1382-88 nn.3-6 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).



Any other approach would directly conflict with Congress' intent to encourage the development of the atomic energy industry. *O'Conner*, 13 F.3d at 1095; *In re TMI*, 940 F.2d at 852. Using the permissible dose limits as the sole standard of care achieves a fair balance for users of radioactive materials, workers and the general public:

> In a highly technical field such as this, although a plaintiff should be provided a very high level protection from excessive exposure from radiation, a defendant public utility should also be provided with some clear statement regarding how it may limit a worker's dose without exposing the worker to injury or itself to liability.

*O'Conner*, 748 F. Supp. at 678.

### D. Congress Allows Strict Liability in a PLA Only When the NRC or DOE Declares an ENO.

The Amendments Act allows its form of strict liability only after the NRC or the DOE determines that there has been an "extraordinary nuclear occurrence" ("ENO").[11] 42 U.S.C. § 2210(n)(1). Only in an ENO does Price-Anderson require a defendant to "waive (I) any issue or defense as to conduct of the claimant or fault of persons indemnified . . . . " *Id.*; *In re TMI*, 940 F.2d at 852; *O'Conner*, 748 F. Supp. at 675 (waiver of defenses is only applicable to ENO and not to nuclear incidents). Because the NRC has not declared an ENO here, strict liability concepts cannot be applied either by a state or tribal court.

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[11] *See supra* note 3.

## CONCLUSION

This case should be remanded with directions that for Price-Anderson issues tribal law and tribal courts should be treated as state law and state courts under the Act. All tribal causes of action for nuclear incidents have been extinguished, only a PLA can be litigated from plaintiffs' allegations in federal, state or tribal court and defendants have a right of removal to federal court.

Respectfully submitted,

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